

EXHIBIT 5

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
CASE NO. 18-MD-2865 (LAK)

IN RE:)
)
)

CUSTOMS AND TAX ADMINISTRATION OF)
THE KINGDOM OF DENMARK)
(SKATTEFORVALTNINGEN) TAX REFUND)
SCHEME LITIGATION)
-----)

C O N F I D E N T I A L

REMOTE VTC VIDEOTAPED EXPERT DEPOSITION UNDER ORAL
EXAMINATION OF
MARCIA WAGNER

DATE: April 14, 2022

REPORTED BY: MICHAEL FRIEDMAN, CCR

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27 (Pages 102 to 105)

<p style="text-align: right;">Page 102</p> <p>1 A Great.</p> <p>2 Q You wrote that. Right, Ms. Wagner?</p> <p>3 A And as I've said before, you're</p> <p>4 reading only part of what I wrote. So for</p> <p>5 the record, I would like to say what the</p> <p>6 entire sentence says so it's not misleading</p> <p>7 in any way, shape or form.</p> <p>8 And I quote, "While I do not</p> <p>9 believe that it is an expert's role to opine</p> <p>10 on a defendants' intent, if asked, and based</p> <p>11 on the totality of circumstances here, I</p> <p>12 would advise that there's no reason to</p> <p>13 believe that the defendant intended to</p> <p>14 establish permanent plans and that the</p> <p>15 objective factors I have reviewed point</p> <p>16 decidedly to the contrary."</p> <p>17 That is the full sentence, and</p> <p>18 that's why I thought it was important that</p> <p>19 the full sentence and not the first clause</p> <p>20 thereof be that which we are referring to.</p> <p>21 Now --</p> <p>22 Q I asked you a simple question,</p> <p>23 Ms. Wagner. Do you or do you not believe</p> <p>24 that it is an expert's role to opine on a</p> <p>25 defendants' intent?</p>	<p style="text-align: right;">Page 103</p> <p>1 MR. MAGUIRE: Asked and answered,</p> <p>2 but you can --</p> <p>3 THE WITNESS: Asked and answered --</p> <p>4 MR. MAGUIRE: You can answer again.</p> <p>5 A Again, my third time answering</p> <p>6 this, I specifically wrote that, no, that is</p> <p>7 not in general the role of an expert, and</p> <p>8 then I said, however, if asked, my answer</p> <p>9 would be.</p> <p>10 Is that helpful to you, Mr. Dewey?</p> <p>11 Q And you're not opining on</p> <p>12 defendants' intent, or so you just told us.</p> <p>13 Right?</p> <p>14 A That would be true, Mr. Dewey.</p> <p>15 Q You nonetheless say a few pages</p> <p>16 later in the report that the individual</p> <p>17 defendants were motivated by self-interest.</p> <p>18 Right?</p> <p>19 A Would you please give me the</p> <p>20 paragraph and the page so I can look at what</p> <p>21 exactly you're referring to to give you again</p> <p>22 a fulsome answer?</p> <p>23 Q Sure. It's page 25, Paragraph 46.</p> <p>24 A And what sentence are you talking</p> <p>25 about, please?</p>
<p style="text-align: right;">Page 104</p> <p>1 Q So it's six lines down. "As you</p> <p>2 previously observed, however, in this case</p> <p>3 self-interest motivated the individual</p> <p>4 defendants," and then the sentence goes on.</p> <p>5 You felt comfortable expressing</p> <p>6 that opinion, didn't you, Ms. Wagner?</p> <p>7 A Again, you seem to like to take</p> <p>8 words out of context.</p> <p>9 The full sentence states, and I</p> <p>10 quote, "As I have previously observed,</p> <p>11 however, in this case, self-interest</p> <p>12 motivated the individual defendants to</p> <p>13 disregard fundamental standards related to</p> <p>14 the basic purpose of their plans, i.e.,</p> <p>15 accumulating assets for use after retirement</p> <p>16 since the Solo transaction was available only</p> <p>17 if they agreed to depart from those standards</p> <p>18 by allocating most of the proceeds to third</p> <p>19 parties."</p> <p>20 That is what I wrote, and that is</p> <p>21 what I stand by. You can't just look at one</p> <p>22 clause. It's not accurate.</p> <p>23 Q And you do not view that as an</p> <p>24 opinion on defendants' intent. Right?</p> <p>25 A I view it for exactly what it</p>	<p style="text-align: right;">Page 105</p> <p>1 states.</p> <p>2 Q You do not view that as an opinion</p> <p>3 on defendants' intent. Right?</p> <p>4 A I view that as a statement that</p> <p>5 they were motivated by self-interest, and</p> <p>6 that motivation led to the abdication of</p> <p>7 general principles applicable to retirement</p> <p>8 plans.</p> <p>9 Q Okay. And that's a statement of</p> <p>10 intent, isn't it, Ms. Wagner?</p> <p>11 MR. MAGUIRE: Objection.</p> <p>12 A I don't think so.</p> <p>13 Q So saying someone is motivated by</p> <p>14 self-interest is not a statement about a</p> <p>15 person's intent in your opinion?</p> <p>16 MR. MAGUIRE: Objection.</p> <p>17 A I really don't know what you're</p> <p>18 saying. I don't know what to say other than</p> <p>19 I think people create plans motivated out of</p> <p>20 self-interest.</p> <p>21 Q Okay. You haven't opined on any</p> <p>22 defendant's intent in your view. Right,</p> <p>23 Ms. Wagner?</p> <p>24 A As I believe I stated, I have not</p> <p>25 opined on that, but if I were asked, my</p>

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<p style="text-align: right;">Page 118</p> <p>1 I am not sure if the IRS received</p> <p>2 those plan documents, and if that's what</p> <p>3 you're asking, I can't say definitively one</p> <p>4 way or the other.</p> <p>5 Q So you just don't know as we sit</p> <p>6 here today whether the IRS got other plan</p> <p>7 documents. Right?</p> <p>8 A I believe I can say definitively</p> <p>9 that the IRS got K1s with respect to other</p> <p>10 plans, but I'm not sure. I'm not sure if the</p> <p>11 IRS looked at any other plan documents,</p> <p>12 although I don't think so. I don't think I</p> <p>13 saw that in the record.</p> <p>14 Q Okay. And those other plans were</p> <p>15 plans that were also engaged in dividend</p> <p>16 arbitrage trading in Denmark. Right?</p> <p>17 A As I recall, those plans were in</p> <p>18 partnerships so-called with other nominee</p> <p>19 plans, and those plans that were run by</p> <p>20 Mr. Markowitz, Mr. Van Merkensteijn and</p> <p>21 others, Mr. Klugman received, I believe it</p> <p>22 was almost 95 percent of the dividends of the</p> <p>23 reclaim dividends, and that is -- that was</p> <p>24 their source of income.</p> <p>25 I'm not sure the IRS was aware of</p>	<p style="text-align: right;">Page 119</p> <p>1 that, but they did receive those K1s, so yes.</p> <p>2 Q Okay. The audit was closed in</p> <p>3 February of 2020. Right?</p> <p>4 A I don't recall the date of closure.</p> <p>5 Q Okay. Well, in any event it was</p> <p>6 closed long after the dividend arbitrage</p> <p>7 trading in Denmark had stopped. Right?</p> <p>8 A It depends how you define long</p> <p>9 after.</p> <p>10 Q Five years long enough?</p> <p>11 A If it was five years, I'd like to</p> <p>12 call it five years.</p> <p>13 Q Do you know, Ms. Wagner, when the</p> <p>14 dividend arbitrage trading in Denmark</p> <p>15 stopped?</p> <p>16 (Whereupon a discussion was held</p> <p>17 off the record.)?</p> <p>18 A I believe toward the end of 2015.</p> <p>19 I could be off by a few months.</p> <p>20 Q Okay. And the RJM audit was</p> <p>21 several years after that. Right?</p> <p>22 A I believe so.</p> <p>23 Q Okay. And, indeed, the RJM audit</p> <p>24 occurred after the first of these lawsuits</p> <p>25 had been filed. Right?</p>
<p style="text-align: right;">Page 120</p> <p>1 A I'm not sure. When were the</p> <p>2 first -- you would have to give me the exact</p> <p>3 date when the -- the exact date as to when</p> <p>4 these filings were made.</p> <p>5 Q Okay. So maybe we can refer,</p> <p>6 Ms. Wagner, to your February 1st rebuttal</p> <p>7 report.</p> <p>8 MR. DEWEY: Mark this as 5352.</p> <p>9 (Whereupon the above mentioned was</p> <p>10 marked for Identification.)</p> <p>11 A Okay.</p> <p>12 MR. MAGUIRE: Whenever you're</p> <p>13 ready, Tom.</p> <p>14 MR. DEWEY: Okay.</p> <p>15 Q You have the document, Ms. Wagner?</p> <p>16 A The expert rebuttal report of</p> <p>17 Marcia S. Wagner; is that the one you're</p> <p>18 talking about?</p> <p>19 Q Indeed, yeah. And you'll see that</p> <p>20 on the first page it bears a master docket</p> <p>21 number 18 MD 2865. Do you see that?</p> <p>22 A I do.</p> <p>23 Q So assuming that that denotes 2018,</p> <p>24 the RJM audit ended after 2018. Correct?</p> <p>25 A You're going -- I don't know. I</p>	<p style="text-align: right;">Page 121</p> <p>1 don't know when the RJM audit ended. If you</p> <p>2 would like to tell me or point me to</p> <p>3 something, that would be helpful.</p> <p>4 Q Okay. If you would turn, please,</p> <p>5 Ms. Wagner, to Page 6, paragraph 10 of this</p> <p>6 rebuttal report.</p> <p>7 Are you with me, Ms. Wagner?</p> <p>8 A Yes, I am on Page 6, paragraph 10.</p> <p>9 Q Excellent.</p> <p>10 So about ten lines up from the</p> <p>11 bottom, you say, "In this connection the</p> <p>12 Reish report does not assert and I have not</p> <p>13 seen anything in the records indicating that</p> <p>14 Markowitz or representatives disclosed to the</p> <p>15 IRS examiner the RJM plan's massive purchases</p> <p>16 of Danish stocks."</p> <p>17 Do you see that?</p> <p>18 MR. MAGUIRE: Sorry. Where is</p> <p>19 that, Tom? I thought you said ten lines</p> <p>20 up from the bottom.</p> <p>21 A Yeah, I do see it. It's right</p> <p>22 here.</p> <p>23 MR. MAGUIRE: Okay.</p> <p>24 A Yes, I see it.</p> <p>25 Q Okay. In fact, those purchases</p>

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<p style="text-align: right;">Page 122</p> <p>1 were disclosed to the IRS, weren't they, 2 Ms. Wagner? 3 MR. MAGUIRE: Objection to form. 4 A Well, it's a question as to whether 5 I had that documentation at the time. We 6 received a lot of documentation by the time 7 of the reply, but it seems that the audit 8 documentation that I received wasn't complete 9 I believe at the time of this, but I do 10 believe that, yes, at some point after I 11 believe this was written I did see that type 12 of disclosure. 13 Q Okay. So the statement that you 14 made here is inaccurate. Right, Ms. Wagner? 15 MR. MAGUIRE: Objection to form. 16 A I don't think I said that. I think 17 it was accurate when written with the 18 information that was disclosed. 19 The audit information that was 20 provided was not provided to me, I think, 21 from you all on a timely basis. 22 MR. DEWEY: I'm sorry. You froze 23 again. Can you hear me now? 24 MR. MAGUIRE: Yeah, we can hear you 25 fine.</p>	<p style="text-align: right;">Page 123</p> <p>1 MR. DEWEY: Okay. 2 Q So in any event, the IRS had data 3 concerning the RJM plan purchases of Danish 4 stocks. Right? 5 A Could you read back the answer that 6 I provided to make sure I got -- it got into 7 the record? Because I think that answered 8 the question. 9 Q Well, you froze, so I apologize 10 if -- 11 MR. MAGUIRE: Mike got the full 12 answer. 13 A Well, I think I've answered that 14 question, Mr. Dewey. 15 Q And the answer is yes. Right? 16 MR. MAGUIRE: Objection. 17 A The answer is I eventually got the 18 information. 19 Q And the information showed that the 20 trading in Danish stocks of the RJM plan was 21 disclosed to the IRS. Right? 22 A That was information that was 23 eventually provided to me, yes. 24 Q Okay. 25 MR. DEWEY: Okay. Lunch still?</p>
<p style="text-align: right;">Page 124</p> <p>1 MR. MAGUIRE: Sounds good, Tom. 2 MR. DEWEY: 1:15? 3 MR. MAGUIRE: Do you want to do 4 1:10? 5 MR. DEWEY: Sure. That's fine, 6 yeah. 7 MR. MAGUIRE: Okay. 8 THE VIDEOGRAPHER: Okay. 9 Stand by. 10 The time is 12:37 p.m., and we're 11 going off the record. 12 (Lunch recess taken.) 13 THE VIDEOGRAPHER: Stand by. 14 The time is 1:20 p.m., and we're 15 back on record. 16 Q Good afternoon, Ms. Wagner. 17 A Good afternoon, Mr. Dewey. 18 Q You state in your CV which is an 19 exhibit to your initial expert report -- 20 MR. MAGUIRE: I think you froze on 21 us, Tom. 22 (Whereupon a discussion was held 23 off the record.) 24 Q I will start again. 25 You state in your CV that is</p>	<p style="text-align: right;">Page 125</p> <p>1 attached as an exhibit to your report, 2 Ms. Wagner, that you were a partner in K&L 3 Gates. Right? 4 A Well, actually I think I was a 5 partner at Warner & Stackpole that became K&L 6 Gates. 7 Q So I guess my question is were you 8 or were you not ever a partner at the K&L 9 Gates law firm? 10 MR. MAGUIRE: Tom, you froze again. 11 (Whereupon a discussion was held 12 off the record.)? 13 A No, I was a partner at Warner & 14 Stackpole that became known as K&L Gates. 15 Similarly, I was an associate at 16 Bingham Dana & Gould, which is now known as 17 Morgan Lewis & Bockius. These firms change 18 their names. 19 Q So you were a partner at the Warner 20 & Stackpole firm. Right? 21 A And I believe that Warner & 22 Stackpole was acquired by K&L Gates, yes. 23 Q Do you know that to be the case? 24 A I don't know if it was acquired in 25 total, but I do know that there was a merger,</p>

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<p style="text-align: right;">Page 146</p> <p>1 In fact, if I can direct you to the</p> <p>2 next paragraph, it says, "While the</p> <p>3 documentation of the transaction cannot be</p> <p>4 ignored, it should also be noted that the</p> <p>5 intent of the parties was that the</p> <p>6 arrangement was the nature of the -- of a</p> <p>7 partnership," so effectively the plans are a</p> <p>8 partnership with Solo -- with Solo receiving</p> <p>9 a very significant part of the profits.</p> <p>10 That, I can assure you, is</p> <p>11 extraordinarily atypical and not what I've</p> <p>12 ever seen plans do when they invest in</p> <p>13 partnerships.</p> <p>14 Q So hypothetically, if a plan</p> <p>15 invests in a hedge fund and the plan agrees</p> <p>16 to pay the hedge fund 3, 3 and 30, which I</p> <p>17 assume you understand, is that in your view</p> <p>18 acceptable or not?</p> <p>19 A I've never seen a 3 and 30. I have</p> <p>20 seen a 2 and 20. I just haven't seen a 3 and</p> <p>21 30.</p> <p>22 Q Would that, in your opinion,</p> <p>23 Ms. Wagner, be a violation of the exclusive</p> <p>24 benefit rule?</p> <p>25 A It's a facts and circumstances</p>	<p style="text-align: right;">Page 147</p> <p>1 issue based on the services proffered by the</p> <p>2 hedge fund and if it's reasonable given the</p> <p>3 marketplace.</p> <p>4 Q Okay. So you can express an</p> <p>5 opinion as we sit here today on a</p> <p>6 hypothetical circumstance where a payment of</p> <p>7 3 and 30 would be acceptable or not?</p> <p>8 A What I am saying definitively is</p> <p>9 I've not seen in any of the transactions.</p> <p>10 I've worked on hedge funds charging 3 and 30.</p> <p>11 What I said is that I have seen in</p> <p>12 the past, though not recently, a more typical</p> <p>13 2 and 20 type of arrangement, though I'm not</p> <p>14 sure I have seen that in the more recent</p> <p>15 past. That was the more distant past.</p> <p>16 Q Do you know, Ms. Wagner, how many</p> <p>17 plans were disqualified in the last two years</p> <p>18 for paying excessive fees under the exclusive</p> <p>19 benefit rule?</p> <p>20 A I do not.</p> <p>21 Q Okay. Would it surprise you if the</p> <p>22 answer were zero?</p> <p>23 A I don't know one way or the other.</p> <p>24 Q You cite in your reports,</p> <p>25 Ms. Wagner, various recordkeeping</p>
<p style="text-align: right;">Page 148</p> <p>1 requirements. Do you recall that?</p> <p>2 A Yes.</p> <p>3 Q Those requirements are not a</p> <p>4 qualification requirement under the code, are</p> <p>5 they?</p> <p>6 A No.</p> <p>7 Q I want to direct you, if I may,</p> <p>8 Ms. Wagner, to your reply report, which is a</p> <p>9 reply to Mr. Ross, that is, which is, I'm</p> <p>10 told it's Exhibit 5354.</p> <p>11 (Whereupon the above mentioned was</p> <p>12 marked for Identification.)</p> <p>13 MR. MAGUIRE: It's the last one in</p> <p>14 the big binder.</p> <p>15 (Whereupon a discussion was held</p> <p>16 off the record.)?</p> <p>17 A Yes, I have Exhibit 5354.</p> <p>18 Q Okay. You understand, do you not,</p> <p>19 Ms. Wagner, that Mr. Ben-Jacob is not a</p> <p>20 pension lawyer. Right?</p> <p>21 A Do I understand that Mr. Ben-Jacob</p> <p>22 is not an ERISA lawyer? Yes, that's my</p> <p>23 understanding.</p> <p>24 Q And he's not a pension lawyer at</p> <p>25 all. Right?</p>	<p style="text-align: right;">Page 149</p> <p>1 MR. MAGUIRE: Sorry, Tom. You cut</p> <p>2 out a little bit there.</p> <p>3 Can you just repeat that question?</p> <p>4 MR. DEWEY: Sure.</p> <p>5 Q My question was do you understand</p> <p>6 that Mr. Ben-Jacob is not a pension lawyer?</p> <p>7 A I understand that Mr. Ben-Jacob is</p> <p>8 not a pension lawyer.</p> <p>9 Q Okay. And you certainly</p> <p>10 understand, do you not, Ms. Wagner, that</p> <p>11 Mr. Ben-Jacob is not a Danish lawyer. Right?</p> <p>12 A I believe that Mr. Ben-Jacob is not</p> <p>13 a Danish lawyer.</p> <p>14 Q Okay. And if I could direct you to</p> <p>15 Page 13 of 5354.</p> <p>16 A Sorry. Page 13, you said?</p> <p>17 Q One, three, yes. That's right.</p> <p>18 A Okay.</p> <p>19 Q And directing your attention,</p> <p>20 Ms. Wagner, to Footnote 36 on Page 13 --</p> <p>21 MR. MAGUIRE: Sorry, Tom. You cut</p> <p>22 out for that question.</p> <p>23 MR. DEWEY: Sorry.</p> <p>24 Q Yes, Page 13, Footnote 36.</p> <p>25 A Okay.</p>

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<p>1 Page 19, Ms. Wagner. Are you 2 there? 3 A I am. 4 Q Okay. You reference in the last 5 sentence of this rebuttal report, "Widespread 6 departures from standards embraced by the 7 retirement plan industry." 8 Do you see that? 9 A I do. 10 Q And you reference retirement plan 11 industry standards other times throughout 12 your reports. Right? 13 A I may. 14 Q Is alleged inconsistency with 15 retirement industry standards a basis for 16 plan disqualification? 17 A If they -- well, I think we're 18 conflating two issues here. The basis of 19 disqualification would be the exclusive 20 benefit rule issue, the commingling issue, 21 the funding issue, the permanence issue. 22 The issue with respect to whether 23 these plans were shams, I think you look at 24 the whole variety of other issues; are they 25 mirror paper transactions.</p>	<p>1 So, for example, Mr. Klugman 2 specifically stated, "Hey, I did this. I was 3 promised a million bucks a plan." 4 People in general, it's okay for 5 somebody to sign a piece of paper without 6 reading the plan document. It doesn't happen 7 that often. It's highly atypical for plan 8 sponsors not to care about deductibility. 9 It's highly atypical for there to be no 10 investment whatsoever by the plan. 11 It's highly atypical that things be 12 fully leveraged, like infinite leverage. I 13 mean it's highly atypical for there to be no 14 trade or business supporting a plan. 15 The list goes on and on with things 16 that are highly, highly atypical. 17 Q Do you remember what question I 18 asked you, Ms. Wagner? 19 A Yes, I do remember what question 20 you asked me. I believe the question is, is 21 the fact that you're departing from 22 retirement industry standards a basis for 23 plan disqualification? 24 And I believe I answered that the 25 bases for plan disqualification that I</p>
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<p>1 clearly put in my reports are as follows: 2 Commingling of trust assets, permanency, 3 funding, exclusive benefit. 4 I further state that there are many 5 indicia that make it look like these plans 6 were shams. 7 Q So is the answer to my question no, 8 Ms. Wagner? 9 A I think I answered your question 10 appropriately. 11 Q Not really. 12 My question for the third time is, 13 is an alleged departure from a retirement 14 industry standards a basis for plan 15 disqualification? 16 MR. MAGUIRE: Asked and answered, 17 but you can answer again. 18 A If the departure again is 19 commingling of plan assets, if the departure 20 is extreme violations of basic rules such as 21 exclusive benefit permanency and funding, 22 absolutely. 23 There are other rules that make 24 this appear just like a sham that are basic 25 industry standards; no records, no</p>	<p>1 recordkeeping, the plan participants having 2 no idea if their plans exist or if they're 3 abandoned or if the LLCs exist or if they're 4 abandoned, having no idea if contributions 5 were deductible, having money that was 6 distributed from Solo when it was not going 7 to plans themselves but to people such as 8 with the Lehman plans. 9 There were just so many violations 10 of basic fundamental foundational retirement 11 industry standards what a true pension plan 12 does that this looks like a sham. 13 MR. DEWEY: So I move to strike the 14 non-answer. 15 Q If you could turn, please, to your 16 February 28th rebuttal report, Ms. Wagner -- 17 sorry, it's a reply report, which is 5353. 18 Directing your attention, 19 Ms. Wagner, to page 10, 35, Footnote 35. 20 A I'm sorry. Where? 21 Q Page 10, Footnote 35. 22 A Yes. 23 Q There's a reference there to the 24 better-advised LLCs. 25 Do you see that, Ms. Wagner?</p>